IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

TIFFANY HILL o/b/o J.M.W.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**No. 5:16-cv-00176-MTT CHW**
	:	
CAROLYN W. COLVIN,	:	**Social Security Appeal**
Acting Commissioner of Social Security,	:	
	:	
Defendant.	:	
	:	

RECOMMENDATION

This is a review of a final decision by the Commissioner of Social Security denying Plaintiff Tiffany Hill's application, on behalf of her minor son J.M.W., for supplemental security income ("SSI") benefits. The record demonstrates that substantial evidence supports the administrative law judge's ("ALJ") findings and the Appeals Council properly declined to review the ALJ's determination. In accordance with the analysis below, it is hereby **RECOMMENDED** that the Commissioner's decision be **AFFIRMED** and that Plaintiff's Motion to Remand (Doc. 16) be **DENIED.** Additionally, Plaintiff's unopposed Motion to Supplement the Transcripts (Doc. 16) is **GRANTED** and supplemental material was considered by the Court in this ruling.

BACKGROUND

Plaintiff filed an application for child's SSI benefits on March 30, 2012, alleging J.M.W.'s disability began on August 1, 2010. (R. 214). Plaintiff, however, amended her application by the time of the hearing to allege that Plaintiff's disability onset date was March, 28, 2012. (R. 52). Plaintiff's application was denied and Plaintiff requested a hearing before an

ALJ. On May 15, 2014, Plaintiff had a hearing before an ALJ and on August 25, 2014, the ALJ denied Plaintiff's application. (R. 73, 52-66). Plaintiff appealed the ALJ's decision to the Appeals Council and the Appeals Council denied Plaintiff's request for review on March, 10, 2016. (R. 1-7). Plaintiff now appeals to this Court for review of her son's application.

STANDARD OF REVIEW

District courts have a limited role in reviewing claims brought under the Social Security Act. Review of the Commissioner's decision is restricted to a determination of whether the decision is supported by substantial evidence and whether the correct legal standards were applied. *Walker v. Bowen*, 826 F.2d 996, 1000 (11th Cir. 1987). "Substantial evidence" is defined as "more than a scintilla," and as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Winschel v. Comm'r of Soc. Sec.*, 631 F.3d 1176, 1178 (11th Cir. 2011). Consequently, a court's role in reviewing claims brought under the Social Security Act is quite narrow.

District courts must defer to the Commissioner's factual findings. Courts may not decide facts, re-weigh evidence, or substitute their judgment for that of the Commissioner. *Id.*; *Bloodsworth v. Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983). Credibility determinations are left to the Commissioner and not to the courts. *Carnes v. Sullivan*, 936 F.2d 1215, 1219 (11th Cir. 1991). It is also up to the Commissioner and not to the courts to resolve conflicts in the evidence. *Wheeler v. Heckler*, 784 F.2d 1073, 1075 (11th Cir. 1986); s*ee also Graham v. Bowen*, 790 F.2d 1572, 1575 (11th Cir. 1986). Courts must scrutinize the entire administrative record to determine the reasonableness of the Commissioner's factual findings. *Bloodsworth*, 703 F.2d at 1239. Even if the evidence preponderates against the Commissioner's decision, though, the decision must be affirmed if it is supported by substantial evidence. *Chambers v. Comm'r of Soc.*

Sec., 662 F. App'x 869, 870 (11th Cir. 2016); *Winschel*, 631 F.3d at 1178; *Crawford v. Comm'r Of Soc. Sec.*, 363 F.3d 1155, 1158–59 (11th Cir. 2004).

The Commissioner's findings of law are given less deference. Courts must determine if the Commissioner applied the proper standards in reaching a decision. *Harrell v. Harris*, 610 F.2d 355, 359 (5th Cir. 1980). Courts must therefore consider any questions of law *de novo*, and "no . . . presumption of validity attaches to the [Commissioner's] conclusions of law, including determinations of the proper standards to be applied in reviewing claims." *Wiggins v. Schweiker*, 679 F.2d 1387, 1389 (11th Cir. 1982). The Commissioner's failure to apply the correct legal standards or to provide a sufficient factual basis for the court to determine that the correct legal standards have been followed is grounds for reversal. *Id.*

EVALUATION OF DISABILITY

Persons under the age of 18 are "disabled" for purposes of receiving Title XVI benefits if they have "a medically determinable physical or mental impairment which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(i).

When analyzing the issue of disability for persons under the age of 18, the ALJ uses a three-step sequential evaluation procedure. 20 C.F.R. § 416.924(a). At step one, the ALJ determines whether the child is engaged in substantial gainful activity. 20 C.F.R. § 416.924(b). At step two, if the child is not engaged in substantial gainful activity, the ALJ determines whether the child has a medically determinable impairment or combination of impairments that is "severe." 20 C.F.R. § 416.924(c). At step three, the ALJ determines whether the child's

impairment or combination of impairments meets or is medically or functionally equal to one of the listings, and otherwise satisfies the duration requirement. 20 C.F.R. § 416.924(d).

To determine whether the child's impairment functionally equals a listed impairment, the ALJ must consider six "domains," which are "broad areas of functioning intended to capture all of what a child can and cannot do." 20 C.F.R. § 416.926a(b)(1). The six domains include: (1) acquiring and using information, (2) attending and completing tasks, (3) interacting and relating with others, (4) moving about and manipulating objects, (5) caring for yourself, and (6) health and physical well-being. 20 C.F.R. § 416.926a(b)(1)(i)-(vi). To satisfy the "functional equivalent" standard, the child must have either "marked" limitations in two domains or an "extreme" limitation in one domain. 20 C.F.R. § 416.926a(d)

DISABILITY EVALUATION IN THIS CASE

a. Factual Background and Medical Evidence

J.M.W ("Claimant'), was born on December 14, 2003. (R. 214). Claimant was ten years old at the time of the ALJ's decision. (R. 66). Claimant was first referred to Dr. Mark Prigatano for a psychological evaluation on February 15, 2011. (R. 266). The evaluation was conducted because of Claimant's behavior. *Id.* Claimant had a prior diagnosis of attention deficit disorder and Dr. Prigatano wanted to clarify that disorder and determine if Claimant had any coexisting disorders. *Id.* Claimant was highly distractible and forgetful, and had severe angry outbursts. *Id.* Dr. Prigatano performed several tests and assessments on Claimant, and his diagnostic impressions included Mood Disorder, Attention Deficit Hyperactivity Disorder ("ADHD"), and Tic Disorder, but ruled out Tourette's Syndrome. (R. 273). Dr. Prigatano recommended continued psychiatric care and possible school accommodations. *Id.*

Dr. Prigatano had a session with Claimant on June 2, 2011. (R. 581). Claimant was doing well academically and had advanced to the next grade, but was "very hyperactive." *Id.* Plaintiff took Claimant "off of Concerta because she heard negative things about it," and Dr. Prigatano assessed that Claimant was "not doing as well since ceasing medication." *Id*. Dr. Prigatano's recommendation was for Plaintiff to give Claimant stimulant medication again and for Plaintiff to inform the prescribing physician of any negative reactions. *Id*. On July 7, 2011, Dr. Prigatano noted that Claimant was still hyperactive and was having trouble sleeping. (R. 580). Plaintiff, however, believed that Claimant was progressing positively. *Id.* Claimant's assessment was "about the same" and Claimant was inattentive and hyperactive. *Id*. Dr. Prigatano instructed Plaintiff with suggestions to help with sleep. *Id.*

Claimant visited Dr. Prigatano again on September 19, 2011. (R. 579). Dr. Prigatano noted that Claimant was "off the chain" and that he was getting into trouble daily at school. *Id.* Claimant, however, was doing well academically. *Id.* Dr. Prigatano informed Plaintiff about the "potential problems with [spanking]" and noted that Claimant's stimulant medications may need adjusting. *Id.* Claimant's November 28, 2011 assessment was similar, in that he was continuing to get in trouble at school and was hyperactive. (R. 578). Accommodations at school were suggested. *Id.* Dr. Prigatano noted that Claimant had returned to school in January of 2012 and that school was "so far, so good." (R. 577). Plaintiff had stopped administering Concerta to Claimant "to see how [Claimant] does without [the medication]. *Id.* Claimant was continuing to show anger but was not showing prolonged outbursts. *Id.*

On February 20, 2012, Dr. Prigatano noted that Claimant remained hyperactive and was having trouble with behavior at school. (R. 576). Claimant was assessed with bipolar disorder

after Dr. Prigatano opined that Claimant "meets [the] criteria for juvenile onset [of] bipolar disorder." *Id.*

Claimant's mother, the Plaintiff in this case, completed a Function Report on March 30, 2012. (R. 232). Plaintiff noted that Claimant could not make new friends and had trouble getting along with other kids, adults, and teachers. (R. 238). Claimant had trouble completing basic personal actions such as brushing teeth and combing hair, and Claimant had difficulty finishing things he started. (R. 239-40). Plaintiff noted that Claimant was taking Methylphenidate and Depakote, both of which were prescribed by Dr. Naqvi. (R. 247).

The Wilkinson County School System implemented a Section 504 Plan for Claimant on April 23, 2012. (R. 252). The 504 initial evaluation showed that Claimant was performing well academically before implementation of medication but often had to be often redirected prior to medication. (R. 253). It was noted that Claimant's behavior had "drastically improved since medication began," but there was a concern about the ability to remain focused and maintain appropriate behavior due to Claimant's history of aggressive behavior. *Id.* The summary notes of the 504 evaluation meeting also show that Claimant's "behavior has improved in morning and afternoon since medication has begun." (R. 254). The final 504 plan made several accommodations:

- Make sure [Claimant] is paying attention before giving oral directions.
- Establish eye contact. Have him repeat direction to verify understanding.
- Give clear direction. Write multi-step directions on the board.
- Considering providing a quiet place for [Claimant] to complete work as needed.

(R. 255).

On April 26, 2012, Claimant's teachers completed a questionnaire form. (R. 256-63). The teachers noted that they saw Claimant on a daily basis during school hours and that Claimant was

above average academically while on medications. (R. 256-58). Without medications, Claimant was much more distracted and was "out of his seat, moves around on the floor, picks up items and plays with them, or chews on inappropriate items – strings, erasers." *Id.* The teachers also stated that "[p]rior to medication he would also be disruptive by doing things to get attention from others." *Id.* Modifications had been implemented, such as moving Claimant from his homeroom because he was having trouble cooperating with his classmates, but the teachers stated "[t]his has gotten much better since medication." (R. 259). It was noted that Claimant did not frequently miss school due to illness. (R. 262).

Claimant showed improvement throughout the summer of 2012. On April 30, 2012, Dr. Prigatano noted Claimant was "doing okay, per mother" and now had a 504 plan in place. (R. 575). Claimant was taking Depakote and was picking and biting his sores. *Id.* Dr. Prigatano observed a "modest improvement" in Claimant. *Id*. Claimant showed no major problems at his May 29, 2012 follow-up. (R. 574). Claimant was still having trouble falling asleep, and there were no changes in his medications. *Id*. Dr. Prigatano noted Claimant's grandmother observed improvement since restarting his psychostimulant medication. (R. 572). Claimant was praised for his effort and hard work. *Id.* On July 19, 2012, Claimant was sleeping better and had an increased medication dosage. (R. 573). Claimant continued to have good behavior and grades in December of 2012, although there were instances of oppositional behavior. (R. 571). Dr. Prigatano noted that "overall, [Claimant] seems to be doing relatively well." *Id.*

Also in May of 2012, Dr. Prigatano completed a Childhood Mental Functioning Questionnaire. (R. 496). At step one, acquiring and using information, Claimant had no difficulties except a slight problem with comprehending oral instructions. *Id.* At step two, attending and completing tasks, Dr. Prigatano noted Claimant had obvious problems with

keeping focus, focusing long enough to complete tasks, and carrying out multiple step instructions. (R. 497). Dr. Prigatano attributed these findings to Claimant's ADHD. *Id.*

Wilkinson County School System held a second 504 Accommodation Plan meeting on January 17, 2013. (R. 379). Claimant was said to be progressing educationally with his current modifications, and the plan sought to continue current classroom modifications. *Id.* Claimant was allowed additional accommodations such as:

- Small group, extended time, frequent breaks on any testing as needed.
- Small group instruction as needed.
- Provide a quiet place for [Claimant] to complete work as needed.

(R. 380).

Claimant's grandmother took Claimant to see Dr. Prigatano again on February 6, 2013. (R. 570). The grandmother noted that "[Claimant has] improved a lot." *Id.* There had not been any significant problems for months and the "Mother and grandmother feel that the current medication has been quite beneficial." *Id.* Claimant himself "denied any difficulty today." *Id.* Dr. Prigatano reduced his visits with Claimant to as needed. *Id.*

On April 18, 2013, Dr. Prigatano noted that Claimant constantly picked at his sores, chewed on his shirt, frequently blinked and washed his hands, and liked "to order and line things up." (R. 569). Dr. Prigatano was now convinced that Claimant had Tourette's Disorder and referred Claimant to Dr. Trasmonte, a neurologist. *Id.* Dr. Trasmonte examined Claimant on May 20, 2013, and determined that Claimant had Tourette's Syndrome and ADD. (R. 549). Dr. Trasmonte recommended medications, but Plaintiff "want[ed] to hold off until 07/2013 although she does admit that the tics have been a bit annoying." *Id.* Dr. Trasmonte noted Claimant had a history of tics and repetitive movements but that Claimant had been paying better attention since taking medication. *Id.*

Dr. Trasmonte noted at his July 22, 2013 examination of Claimant that Plaintiff was ready for her son to begin medication for tics. (R. 607). Claimant was to continue Concerta and Divalproex, and to start Clonidin. *Id.* at 608. Claimant's appearance was good and he was continuing to improve his ability to focus. *Id.* at 607. On August 23, 2013, Dr. Trasmonte noted that Claimant's tics had reduced since the Clonidine but that he was still having trouble focusing at school. (R. 559). Throughout these visits, Dr. Trasmonte opined that Claimant was "very smart." *Id.* at 559, 607.

On October 18, 2013, Wilkinson County School System had another 504 Accommodation Plan meeting. (R. 374). This meeting again noted that Plaintiff was progressing well with current modification, but a few specific modifications were noted. *Id.*

- Develop behavior management system with shorter increments for rewards and consequences.
- Small group, extended time, frequent breaks on any testing as needed.
- Small group instruction as needed.
- Provide a quiet place for [Claimant] to complete work as needed.

Id. This meeting was in response to a disciplinary report filed against Claimant on October 17, 2013, and other disciplinary reports. (R. 375, 377, 378).

In January of 2014, Kim Seagraves, BSW, ST, examined Claimant for a consultative examination. (R. 616-36). Ms. Seagraves indicated that Claimant was smart and succeeding academically at school. (R. 364). Claimant had the ability to acquire new skills and was willing to improve his behavior. (R. 364-65).

Tammy Pulliam, MA, ST, and Evette Moore, MS, ST, performed counseling for Claimant in January and February of 2014. (R. 640-55). Moore reported that Claimant had a difficult time listening and complying with rules, but that Claimant was receptive to the session and understood that "he feels different when he doesn't take [his] medications." (R. 655). On

January 17, 2014, Claimant was receptive to the counseling sessions and admitted to Moore that his behavior at school was unintentional. (R. 654). Claimant was taught "thought stopping" techniques. (R. 653).

On January 19, 2014, Moore noted that Claimant "demonstrates progress as evidenced by his report of not having any disturbances in the classroom." (R. 652). Sessions on January 20 and 27 noted "moderate progress," although Claimant continued to be hyperactive at home. (R. 647, 650). On January 30, Claimant stated he was having a "good time at home with his siblings" playing in the snow and that he was having moderate progress, evidenced by his report of "completing tasks and being compliant." (R. 645). During a February 21 session, Claimant appeared to be in a good mood and stated that he had been doing better with his behaviors. (R. 640). Plaintiff stated that she was "proud of her son" and wanted to "keep up with his positive progress." *Id.*

On February 7, 2014, a special education eligibility meeting was held regarding Claimant. (R. 354). The committee decided to continue with the special education eligibility determination because Claimant "could benefit from the support of special education services at this time." (R. 365) Claimant's scores varied between superior and low average. Although Claimant was achieving on grade level, he was not achieving scores comparable to his expectancy level. *Id.* The underachievement was attributed to his diagnosis of ADHD and Tourette's Syndrome. *Id.* The committee determined that Claimant was eligible for special education services in the category of "other health impaired." (R. 365).

Dr. Trasmonte examined Claimant again on February 18, 2014. (R. 557). Dr. Trasmonte again opined that Claimant was "very smart" and noted that an IEP plan had been implemented

for Claimant at school. *Id.* Claimant continued to take Clonidine, and there were no reported side effects. *Id.*

Throughout March and May of 2014, Claimant's teachers and Plaintiff communicated through emails regarding Claimant's behavior. (R. 346-53). Claimant's behavior during this period was disruptive, restless, and not "appropriate or nice." *Id*. Claimant had trouble completing assignments and had altercations with other students, sometimes hitting others. *Id.* In one instance, Claimant had a shock device and was using it to shock other students. (R. 350). The teachers, however, noted that Claimant's disruptive behavior was "unusual for [Claimant]" and that Claimant had "[g]reat days!" (R. 348).

Dr. Prigatano examined Claimant again on June 17, 2014, and noted that Claimant had been suspended from school for punching another student "for no apparent reason." (R. 664). Dr. Prigatano stated that Claimant appeared cooperative but quiet and subdued and noted that Claimant was starting to have trouble sleeping again and "wets the bed" at night. *Id.*

Also on June 17, 2014, Dr. Prigatano completed a Childhood Mental Functioning Questionnaire. (R. 659-63). At step one, acquiring and using information, Dr. Prigatano opined that Claimant had no difficulty comprehending, understanding, and expressing age appropriate information. (R. 659). Dr. Prigatano noted that Claimant had very serious difficulties learning new material, recalling and applying previous material, and applying problem solving skills. *Id.* Additionally, Dr. Prigatano stated that Claimant showed increased levels of emotional lability, behavioral disinhibition, and hyperactivity that threatened his academic performance. *Id*. At step two, attending and completing tasks, Dr. Prigatano opined that Claimant was highly inattentive and distractible in the classroom. (R. 660). Claimant had very serious difficulties carrying out

multiple step instructions and focusing enough to finish tasks. *Id.* Claimant demonstrated serious difficulties in keeping his attention focused and carrying out single step instructions. *Id.*

Dr. Prigatano, at step three, interacting and relating with others, found that Claimant had "considerable slippage in this area over the past several months." (R. 661). Claimant had very serious difficulties playing with others, expressing appropriate levels of anger, respecting adults, handling frustration, and being patient. *Id.* Dr. Prigatano stated that Claimant had serious difficulties knowing when to seek help with issues. *Id.* Plaintiff was frequently called by Claimant's teachers regarding his behavior at school, which was sometimes violent. *Id.*

At step four, caring for himself, Claimant was found to have a serious problem responding appropriately to changes in his own mood. (R. 662). Dr. Prigatano found that Claimant was impulsive and was susceptible to major mood swings. *Id.* Claimant had no difficulties at step five, moving about and manipulating objects. (R. 663). Dr. Prigatano concluded that Claimant's problems were "getting worse" and that "[m]edications do not seem to be yielding as much benefit as they once were." *Id.* Additionally, Dr. Prigatano stated that Claimant's symptoms were chronic and would persist throughout his lifetime. *Id.*

Claimant's medical history also includes records of treatment received from Dr. Asad Naqvi, a psychiatrist, from April 2010 to March 2014. (R. 484-88, 594). This medical treatment was mostly unremarkable, except that Dr. Naqvi noted impaired impulse control, concentration, attention, and an irritable mood in 2010. (R. 484). Throughout 2012, Dr. Naqvi stated that Claimant was impaired in his concentration and attention and appeared to have anxious behavior. (R. 518-20, 524, 526, 528, 543, 545, 594, 596, 598).

b. ALJ Hearing

During the ALJ hearing, Plaintiff testified regarding Claimant's condition. Plaintiff stated that a special education teacher followed Claimant at school every day, in addition to his regular teachers. (R. 85). Plaintiff stated that there had been several violent incidents at school and that he was consistently getting into trouble. *Id.* at 85-87. When asked why it took the school system a full year to get an IEP into place, Plaintiff responded, "It was because of me. [Claimant] has been having problems since head start . . . . I used to work at Central State for eight years. . . . I don't want my child to be labeled as being crazy. . . . [the doctor told me] you might just going to have to go ahead and get him an IEP because he's getting worse." (R. 88). When asked who informed her that Claimant was getting worse, Plaintiff responded it was Dr. Prigatano. *Id.* Plaintiff explained that school officials proposed retaining Claimant based on his behavior and inability to focus at times, rather than based on academic performance. (R. 91).

The ALJ questioned Plaintiff about Claimant's medications and the periods of inconsistent compliance. (R. 101). Plaintiff stated that she was not consistent giving Claimant his medications because they "make him like he's a zombie." *Id.* Plaintiff testified that her mother, Claimant's grandmother, was "on me all the time about [Claimant's] medication. [Claimant] needs his medication." *Id.* Plaintiff stated that the medication curbed Claimant's bad behavior, but only for a time and not completely. (R. 102-03). Plaintiff wanted Claimant to be focused "but that medicine. He's having – just like a zombie." (R. 103).

Claimant testified at the ALJ hearing. (115-129). Claimant stated that he had millions of ideas of things to build and that he loved to talk. (R. 116-17). Claimant said he was on the honor roll but that he dislikes reading because "I try to read fast." (R. 118-20). Plaintiff was able to state numerous facts about history and stated his idol was Thomas Jefferson. (R. 123).

The ALJ denied Claimant's application on August 25, 2014. (R. 52). The ALJ determined that Claimant had not been engaged in substantial activity since March 28, 2012, and that he had the following severe impairments: ADHD, mood disorder, and Tourette's Syndrome. (R. 55). These impairments, however, did not meet or equal a listed impairment and Claimant's only limitations that were "less than marked" were Attending and Completing Tasks, Interacting and Relating with Others, and Caring for Yourself. (R. 62, 63, 65).

c. Additional Evidence Provided

Plaintiff provided additional evidence to be reviewed by the Appeals Council. Plaintiff first submitted a psychological evaluation that was performed by Dr. Suzanne Moore on January 24, 2014. (R. 667). The evaluation concluded that Claimant's intellectual functioning level was within the high average range. (R. 670). Claimant did have low average abilities with auditory and visual short-term memory skills, abilities that were "heavily influenced" by Claimant's attention and concentration skills. *Id.* Dr. Moore recommended several accommodations for Claimant, such as establishing eye contact when giving instructions, repeating instructions, and providing short breaks for long assignments. (R. 671).

Plaintiff submitted several emails from Claimant's teachers describing Claimant's behavior in September of 2014. (R. 42-48). On September 15 Claimant was observed to be "very active an[d] unfocused more than usual." (R. 42). The next day Plaintiff received an email stating Claimant "could not control himself." (R. 44). The rest of September, teachers noted that Claimant was "continuously fidgeting" and more "energetic" and "mobile" than usual. (R. 43). The teachers noted, however, that Claimant was positive, cheerful, and not disrespectful. *Id.* Claimant continued to have hyperactive days mixed with days of calm behavior. (R. 46).

Plaintiff submitted Claimant's Individualized Education Program ("IEP"), which was developed by the school system on February 7, 2014. (R. 398). The IEP noted that Claimant was eligible for services in the area of Other Health Impairment ("OHI"). *Id.* Claimant was observed to have difficulty focusing, maintaining attention, and remaining calm during class. *Id.* These impairments were believed to range from mild to severe. *Id.* Plaintiff requested a psychological evaluation for Claimant to be performed by the school system. (R. 399).

The school system completed a Functional Behavior Assessment for Plaintiff on October 3, 2014. (R. 32). Claimant was noted to have dramatic mood swings and to experience trouble completing tasks that were "not of value to him." (R. 32). The frequency of the behavior episodes varied from daily to weekly and the behavior resulted in loss of attention and disruptions. (R. 34).

Plaintiff also submitted another IEP for Clamant that the school system completed on February 6, 2015. (Doc. 15-1, pp. 1-25). Claimant was observed to have difficulty maintaining attention and to suffer from extreme mood swings. *Id.* at 4. Claimant's reading fluency was below the expected number of words per minute due to his inability to concentrate and frequent self-corrections. *Id.* The IEP also identified behaviors such as refusing to comply with teachers or other school personnel, which were noted to cause multiple delays in a day. *Id.* at 5-6.

On March 10, 2016, the Appeals Council denied Claimant's request for review of the ALJ's decision. (R. 1-6). The Appeals Council "considered the reasons you disagree with the decision and the additional evidence listed on the enclosed Order of Appeals Council." *Id.* at 2. Specifically, the Appeals Council examined the teachers' notes and emails from September 2014, the Functional Behavioral Assessment from October 2014, and the IEP from February 2015. *Id.* The Council noted that the ALJ's decision was on August 25, 2014, and that the new

information provided was from a time after the ALJ's decision. The Council thus determined that the new evidence "does not affect the decision about whether you were disabled beginning on or before August 25, 2014." *Id.*

ANALYSIS

Plaintiff contends the ALJ's determination is not based on substantial evidence because (1) the ALJ's determination is not supported by substantial evidence; (2) the Appeals Council failed to properly evaluate the new and material evidence before it; and (3) a remand is appropriate because Claimant has subsequently received disability benefits as of October 2014. (Doc. 16-1, p. 13). The record does not support Plaintiff's arguments.

a. Substantial Evidence Supports the ALJ's Determination

The ALJ's determination that Claimant had less than marked limitations in all of his domains is supported by substantial evidence. Claimant's medical history notes numerous times that Claimant experienced great success while he was on his medication. In April of 2012, the Wilkinson County School System's 504 Plan noted that Claimant was doing well academically and that his behavior had "drastically improved since medication began." (R. 253, 254). Claimant's teachers noticed a stark contrast in Claimant when he was on his medication as opposed to when he was not taking it. (R. 256-63). While on his medication, Claimant was above average academically. (R. 256-58). Without his medication, Claimant was hyperactive. (*Id*.). Throughout April, May, and July of 2012, Dr. Prigatano stated that Claimant was making "modest improvement" and that "overall, [Claimant] seems to be doing relatively well." (R. 571-75).

Claimant continued to improve throughout 2013. The Wilkinson County School System noted in Claimant's 504 Plan in January of 2013 that Claimant was progressing well under his

current plan and medication. (R. 379). In February of 2013, Claimant's grandmother and Plaintiff believed that Claimant's current medication was working and "has been quite beneficial." (R. 570). In April of 2013, Dr. Trasmonte examined Claimant and noted that Claimant exhibited a better ability to focus when on his medication, but that Plaintiff wanted to hold off administering medications for a few months. (R. 549). In July, Plaintiff allowed Dr. Trasmonte to prescribe Concerta, Divalproex, and Clonidin, all of which had positive results on Claimant. (R. 559, 607-08).

The Wilkinson County School System updated Claimant's 504 Accommodation Plan in October of 2013 and noted that Claimant continued to progress well with current medications. (R. 374). Claimant still experienced discipline problems, but his behavior and ability to focus had improved. *Id*.

Claimant showed continued progress through his counseling sessions in January and February of 2014. (R. 640-55). Claimant had a difficult time listening and complying with rules, but he soon began to be receptive to the sessions. (R. 654-55). Thought stopping techniques were helping Claimant experience moderate progress and Claimant even reported that he was completing tasks and was compliant with instructions. (R. 645). Plaintiff observed Claimant's improvement and stated she wanted to continue to keep Claimant's "positive progress." (R. 640).

In February, the school system decided to continue Claimant with his special education eligibility determination because Claimant was benefiting from the services. (R. 354, 365). Although Claimant was not achieving scores comparable to his expectancy level, he was achieving on grade level. (R. 365). Dr. Trasmonte found that Claimant was "very smart" during his February 18, 2014 examination. (R. 557). In fact, Claimant was consistently earning A's in his classes and making the honor roll. (R. 57-58, 228, 283-89). Notes from teachers throughout

March and May of 2014 show that Claimant was hyperactive and disruptive, but some of the teachers noted that "[i]t has been very unusual for [Claimant] to act this way lately." (R. 348). The bad behavior days were intermixed with "[g]reat days!" *Id.*

The evidence above provides substantial evidence to support the ALJ's determination. Claimant consistently improved when he received his medications, as compared to the regression he experienced when he was off of his medications. The shifting from improvement to regression was noticed by Claimant's doctors, teachers, and family. For example, during the ALJ hearing, Plaintiff acknowledged that Claimant did well while on medication but that she didn't give it to him sometimes because the medicines making him seem "like a zombie." (R. 101-03). Plaintiff also stated that Claimant's grandmother encouraged her to give Claimant his medications because they were working. *Id.* Counseling sessions were also improving Claimant's behavior and doctors noted progress throughout the fall of 2013 and spring of 2014. In summary, substantial evidence in the record supports the ALJ's determination that Claimant was not disabled in August of 2014.

The ALJ properly evaluated and considered the opinion of Dr. Prigatano. Generally, a treating physician is awarded substantial or considerable weight unless "good cause" is established. *Phillips v. Barnhart*, 357 F.3d 1232, 1238 (11th Cir. 2004). This Circuit has established that good cause exists when the: "(1) treating physician's opinion was not bolstered by the evidence; (2) evidence supported a contrary finding; or (3) treating physician's opinion was conclusory or inconsistent with the doctor's own medical records." *Id.* at 1240–41; *Mason v. Comm'r of Soc. Sec.*, 430 F. App'x 830, 832 (11th Cir. 2011); *Lewis v. Callahan*, 125 F.3d 1436, 1440 (11th Cir. 1997); *see Iordan v. Comm'r, Soc. Sec. Admin.*, 579 F. App'x 775, 777 (11th Cir. 2014). If good cause is established, the ALJ must specifically state, with particularity, the weight

awarded to the treating physician and the reasons for such weight. *Hunter v. Comm'r of Soc. Sec.*, 651 F. App'x 958, 961 (11th Cir. 2016); *Winschel v. Comm'r of Soc. Sec.*, 631 F.3d 1176, 1178 (11th Cir. 2011).

If a treating physician's opinion is not given controlling weight, the Court must apply several factors to determine the weight to award the physician's opinion. 20 C.F.R. § 404.1527(c)(2); *Sullivan v. Comm'r of Soc. Sec. Admin.*, 353 F. App'x 394, 396 (11th Cir. 2009). Those additional factors include the length of the treatment relationship, the nature and extent of the treatment relationship, the supportability of the relevant evidence, the consistency with the record as a whole, the specialization of the treating physician, and any additional factors. § 404.1527(c)(2)-(6).

Dr. Prigatano's opinion was inconsistent with the record as a whole and with his own treatment records. Dr. Prigatano opined in June of 2014 that Claimant had serious impairments. The evidence within the record, as noted above, supports a different assessment. The ALJ articulated that Dr. Prigatano's opinion contrasted with Claimant's medical record and academic performance because "[Claimant] meets or exceed the standards for his grade level." (R. 57). Dr. Prigatano's records also noted that Claimant's grandmother stated in 2013 that Claimant had improved a lot and that the medications were working, causing Dr. Prigatano to reduce his visits with Claimant. (R. 570).

Additionally, Dr. Prigatano's June 2014 restrictive opinion was not consistent with his own medical records. In 2014, Dr. Prigatano opined that Claimant showed modest improvements. (R. 58, 561, 571). Earlier records in 2012 noted "overall, [Claimant] seems to be doing relatively well." *Id.* For these reasons, the ALJ properly evaluated Dr. Prigatano's opinion and established good cause to award Dr. Prigatano's opinion less than great weight.

The ALJ also properly considered Claimant's school records and fully evaluated Claimant's history. In evaluating the impairments of a child, the Commissioner considers the child's special education and accommodations the child receives. 20 C.F.R. § 416.924a(b)(7)(iv). In her decision, the ALJ reviewed Claimant's school records and the opinions of Claimant's teachers from 2012 through 2014. (R. 58). The ALJ noted that school records showed Claimant "met or exceeded academic standards for his grade level." *Id.* Additionally, the ALJ examined all "relevant evidence" including information from the teachers and information regarding how Claimant functioned while at school. (R. 55). The ALJ noted that the teachers were able to observe Claimant's "functioning in this domain daily." (R. 59).

The ALJ evaluated the "whole child" and was not required to state the weight given to any of Claimant's accommodation plans. The ALJ was required to consider an accommodation plan, not state the weight given to it. 20 C.F.R. § 416.924a(b)(7)(iv); s*ee also* SSR 09–2P, 2009 WL 369032 at *10 (2009) (indicating the Commissioner will consider an accommodation plan when requesting information from a claimant's school); *Williams v. Comm'r of Soc. Sec*, 2013 WL 2295430, at *7 (M.D. Fla. May 24, 2013). Claimant's school records and additional medical evidence provided substantial evidence to support the ALJ's determination.

b. The Appeals Council Properly Declined Plaintiff's Request to Review

The Appeals Council properly evaluated the additional information submitted by Plaintiff and articulated that the evidence did not pertain to the relevant time period. A plaintiff is allowed to present new evidence at every stage of the administrative process, including when he appeals the ALJ's decision to the Appeals Council. *Flowers v. Comm'r of Soc. Sec.*, 441 F. App'x 735, 745 (11th Cir. 2011); *Ingram v. Comm'r of Soc. Sec. Admin.*, 496 F.3d 1253, 1261 (11th Cir. 2007); s*ee* 20 C.F.R. §§ 404.900(b), C.F.R. §§ 404.970(b). The Appeals Council will review the

evidence and order a remand to the ALJ if the additional evidence is "new, material, *relates to the period on or before the date of the hearing decision*, and there is a reasonable probability that the additional evidence would change the outcome of the decision." § 404.970(a)(5) (emphasis added). If the Appeals Council denies review, the Council must show that is has adequately evaluated the plaintiff's newly submitted evidence. *Flowers*, 441 F. App'x at 745.

Plaintiff submitted teachers' notes and emails from September 3, 2014, to September 25, 2014, a Functional Behavioral Assessment dated October 2014, and an Individualized Education Program dated February 2015. (R. 2). All of these additional exhibits, as noted by the Appeals Council, relate to a period after the ALJ's August 25, 2014, decision. 20 C.F.R. §§ 404.70(b), 416.1470(b); *Stone v. Soc. Sec. Admin.*, 658 F. App'x 551, 553 (11th Cir. 2016). Because the evidence is not chronologically relevant, the Appeals Council was not required to consider it. *Stone*, 658 F. App'x 552–53; *Washington v. Soc. Sec. Admin., Comm'r*, 806 F.3d 1317, 1320 (11th Cir. 2015).

The newly submitted evidence did not relate back to a time on or before the ALJ's decision. New evidence that does refer back to a time before the ALJ's decision may be reviewed as chronologically relevant even if the evidence is dated after the ALJ's decision. *Stone*, 658 F. App'x at 553; *Washington*, 806 F.3d at 1322–23. The teachers' notes and emails were the teachers' specific observations of Claimant's behavior on those specific days, all after the date of the ALJ's decision. (R. 42-48). The October 2014 Functional Behavioral Assessment was almost two months after the ALJ's decision and in response to Claimant's behavior in September of 2014. (R. 32); Doc. 16-1, p. 19. Claimant's IEP was initiated in February of 2015, far removed from the ALJ's determination. Doc. 15. None of the newly submitted evidence referred to times before the ALJ's decision. The evidence relates to Claimant's condition after

August of 2014 and how the condition may have deteriorated by then. Accordingly, the new evidence was not chronologically relevant, and the Appeals Council properly denied review

c. Subsequent Favorable Decision

Plaintiff's favorable disability decision on August 4, 2016, is not new and material evidence to be considered. This Circuit has established that a later favorable decision by the Commissioner is not evidence for § 405(g) purposes. *Hunter v. Soc. Sec. Admin., Comm'r,* 808 F.3d 818, 821–22 (11th Cir. 2015), *cert. denied sub nom. Hunter v. Colvin*, 136 S. Ct. 2487 (2016). "A decision is not evidence any more than evidence is a decision," and two decisions with opposite results "could nonetheless be supported by evidence that reasonable minds would accept as adequate." *Hunter*, 808 F.3d at 822. The mere existence of a favorable decision, even if the later favorable decision is just one day after the unfavorable decision, "does not undermine the validity of another ALJ's earlier unfavorable decision or the factfindings upon which it was premised." *Id.*; *Allen v. Commissioner of Social Security*, 561 F.3d 646 (6th Cir.2009) (holding that a later favorable decision, although only one day removed from the ALJ's prior unfavorable decision, did not constitute new and material evidence).

The August 2016 favorable decision noted that Claimant was disabled as of October 2014, more than two months after the denial of the application at hand. Doc. 16-2, p. 1. Two successive ALJ decisions may be supported by substantial evidence yet reach different conclusions. *Hunter*, 808 F.3d at 822. It is the role of the courts to affirm an ALJ's decision if that decision is supported by substantial evidence. 808 F.3d at 822: *Black Diamond Coal Min. Co. v. Dir., OWCP,* 95 F.3d 1079, 1082 (11th Cir.1996). Because the ALJ's decision at issue in this case was supported by substantial evidence, that decision should be affirmed.

CONCLUSION

After a careful review of the record, it is **RECOMMENDED** that Plaintiff's Motion to Remand be **DENIED** and that the Commissioner's decision be **AFFIRMED**. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, WITHIN FOURTEEN (14) DAYS after being served with a copy thereof. The District Judge will make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are further notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO RECOMMENDED, this 22nd day of June, 2017.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge